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January 7, 2009

By e-filing

Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, S.W., Suite 1149
Washington, DC 20024

Re Finance Docket No. 35208, *Winamac Southern Railway Company -- Trackage
Rights Exemption -- A & R Line, Inc. (Now Owned By Toledo, Peoria and
Western Railway Corporation)*

Dear Ms. Quinlan:

Herby transmitted is a Reply In Opposition To Petitions For Stay, for filing with the
Board in the above referenced matter

Very truly yours,



Thomas F. McFarland
*Attorney for Applicant,
Winamac Southern Railway Company*

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BEFORE THE
SURFACE TRANSPORTATION BOARD

WINAMAC SOUTHERN RAILWAY)	
COMPANY -- TRACKAGE RIGHTS)	FINANCE DOCKET
EXEMPTION -- A & R LINE, INC (NOW)	NO 35208
OWNED BY TOLEDO, PEORIA AND)	
WESTERN RAILWAY CORPORATION))	

**REPLY IN OPPOSITION
TO PETITIONS FOR STAY**

WINAMAC SOUTHERN RAILWAY COMPANY
P O Box 745
Kokomo, IN 46903

Applicant

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**REPLY IN OPPOSITION
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Pursuant to 49 C.F.R. § 1104.13(a), WINAMAC SOUTHERN RAILWAY COMPANY (WSRY) hereby replies in opposition to (1) a Petition for Stay filed by TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION (TP&W) on January 2, 2009 (Petition), and (2) a pleading filed by LOGANSPOUT & EEL RIVER SHORT-LINE CO., INC. (L&ER) on January 2, 2009 that seeks a stay to preserve trackage rights and interchange agreements that L&ER claims to have entered into with WSRY.

The pleadings by TP&W and L&ER are directed at a Verified Notice of Exemption under 49 C.F.R. § 1180.2(d)(7) (Verified Notice) that was filed by WSRY on December 11, 2008.

The exemption covered by the Verified Notice is scheduled to become effect on Saturday, January 10, 2009.

WSRY denies that valid trackage rights and interchange agreements exist between WSRY and L&ER. A detailed reply to the L&ER pleading is not required (1) because that pleading does not comply with the Board's requirements for stay petitions (*see, e.g., Grand Elk Railroad, LLC -- Lease and Operation Exemption -- Norfolk Southern Ry. Co.*, STB Finance

Docket No 35187, decision served December 22, 2008 [not printed()], and (2) because whether there are valid trackage rights and interchange agreements between L&ER and WSRV and, if so, whether such agreements would be preserved in light of the proposed exemptions, are clearly matters for a Court, rather than this Board

WSRV's reply to TP&W's Petition follows

I. IT IS HIGHLY UNLIKELY THAT TP&W WILL PREVAIL ON THE MERITS

The exemption covered by the Verified Notice is a class exemption for "(a)cquisition of trackage rights by a rail carrier . . . over lines owned by any other rail carrier . . . that are.

(i) based on written agreements, and (ii) not filed or sought in responsive applications in rail consolidation proceedings " 49 C F R § 11802 (d)(7)

The trackage rights under consideration provide a connection between two otherwise unconnected line segments owned by WSRV, i e , (1) a line segment between Logansport and Brimhurst, IN, and (2) a line segment between Logansport and Kokomo, IN See the map that is attached to the Verified Notice as Appendix 2 As such, the trackage rights are incidental to WSRV's operation of those line segments

As shown below, the trackage rights under consideration clearly comply with the requirements of the class exemption for trackage rights Accordingly, the Petitions should be denied

A. The Trackage Rights Under Consideration Are Based On A Written Agreement

The trackage rights under consideration are based on a written agreement between WSRV and TP&W, namely, the Trackage Rights Agreement between WSRV and A&R Line, Inc ,

entered into on July 17, 1995. A copy of that Agreement is Appendix 1 of the Verified Notice

TP&W succeeded to the interest of A&R Line, Inc. in the Agreement when A&R was merged into TP&W in 2002. *See Rail America, Inc., et al. -- Control and Merger Exempt -- A&R Line, Inc. and J K Line, Inc.*, STB Finance Docket No. 34269, decision served December 12, 2002 (not printed).

In its Petition, TP&W does not (and cannot) deny the existence of that written agreement because it was duly signed by an authorized representative of A&R, and was not challenged by TP&W in any manner during the first six years following TP&W's acquisition of A&R by merger.

The impetus for TP&W's opposition to the trackage rights is WSRY's assignment of those rights to U S Rail Corporation (US Rail) effective January 1, 2009. Prior to that date, the trackage rights had been held by Central Railroad Company of Indianapolis (CERA), as agent of WSRY. TP&W and CERA are sister corporations commonly controlled by Rail America, Inc. (RA).

The trackage rights under consideration are limited to overhead operations, i.e., they do not permit WSRY or US Rail to provide local rail service to any shipper served by TP&W on the trackage rights line. Thus, the trackage rights would not harm TP&W in any respect. TP&W's opposition to the trackage rights is instead motivated by retaliation against WSRY for replacing TP&W's affiliated carrier with US Rail as operator of the trackage rights. The Board looks with disfavor on actions taken strictly for retaliatory purposes rather than for legitimate transportation concerns. *See, e.g., PYCO Industries, Inc. -- Alternative Rail Service -- South Plains Switching,*

Ltd Co , 2007 STB LEXIS 510 at *27 (Finance Docket No. 34890, decision served August 31, 2007)

TP&W's opposition is primarily based on its contention that there no longer is a valid Trackage Rights Agreement because (Petition at 6-7)

- (1) TP&W has terminated the Agreement in accordance with its terms, and
- (2) WSRy has abandoned the Agreement under Indiana law, and
- (3) assignment of the Agreement from WSRy to US Rail is not valid under Indiana law, absent TP&W's consent

WSRY disagrees emphatically with each of those contentions, and is prepared to demonstrate the contrary in an appropriate judicial forum

The Board cannot lawfully stay the exemption based on those contentions because to do so would require the Board to interpret the provisions of the Trackage Rights Agreement and to resolve contract law disputes between the parties, the Board clearly lacks authority to do so *Cleveland Cliffs Iron Co v ICC*, 664 F 2d 568, 591-592 (6th Cir 1981), *Burlington Northern R Co v ICC*, 679 F 2d 934, 941-942 (D C. Cir 1981), *Morristown & Erie Ry, Inc -- Oper Exempt -- Somerset Terminal R Corp* , 2002 STB LEXIS 699 at *3 (Finance Docket No 34267, decision served November 27, 2002), *Coal Trading Corp, et al v B&O Railroad, et al* , 6 I C C 2d 361, 365 (1990) ("The Commission has no jurisdiction to provide such [contractual] interpretation or to determine the rights of the parties under these contracts"), *Railroad Transportation Contracts*, 3 I C C 2d 219, 230, n 6 (1986), *Burlington Northern, Inc -- Trackage Rights*, 347 I C C 210, 213 (1974)

There is no merit to TP&W's secondary argument that the exemption should be stayed because (1) WSRy falsely and misleadingly stated in the Verified Notice that WSRy and CERA

have operated the trackage rights, and (2) the trackage rights have been unauthorized too long for approval to be based on WSRV's oversight in seeking authority

The statement in the Verified Notice that the trackage rights have been operated, is accurate. See the verified statement of Mr. Brad Ortman attached to this Reply as Appendix 1. If the trackage rights had not been operated, there would not have been unauthorized operations that TP&W complains about (Petition at 5-6). The overriding point is that the Board's decision on whether or not to grant the proposed exemption does not depend on whether or not the prior unauthorized trackage rights were operated. That being the case, the statement in the Verified Notice that the trackage rights were operated is not material to the grant of the exemption. The Board will not reject or stay an exemption on the basis of a false or misleading statement that is not material to the grant of the exemption. See, e.g., *R. J. Corman R. Co. v. Penn Lines, Inc. -- Abandon Exempt -- in Clearfield, Jefferson and Indiana Counties, PA*, Docket No. AB-491 (Sub-No. 2X), decision served December 11, 2008, at 2-3, see, also, *Central Illinois R.R. Co. - Lease and Operation - BNSF*, 6 S.T.B. 362, 365 (2002).

While it took a longer time than usual for WSRV to discover its oversight in failing to seek an exemption for its trackage rights, a stay of the exemption on that basis would discourage good faith efforts by carriers to rectify prior mistakes. That would not be sound policy.

There is no contention that the trackage rights are filed or sought in a responsive application in a rail consolidation proceeding.

For each of the foregoing reasons, there is virtually no chance that TP&W's opposition will succeed on the merits.

II. THERE HAS BEEN NO SHOWING OF IRREPARABLE INJURY TO TP&W

In order to establish irreparable injury, a petitioner for a stay must show that it faces unredressable actual and imminent harm that would be prevented by a stay *Tri-State Brick & Stone of NY, Inc., et al -- Pet for Declar Order*, 2008 STB LEXIS 80 at *3 (Finance Docket No 34824, decision served February 12, 2008), and decisions cited in footnote 3 TP&W's Petition does not come close to making that required showing

Litigation costs to enforce one's legal rights have never been considered to constitute irreparable injury TP&W has not cited any instance to the contrary (Petition at 8)

Uncertainty and confusion allegedly caused by the trackage rights (Petition at 8) do not constitute irreparable injury, even if there were merit to the allegation (for which there is not)

TP&W's right to terminate the Trackage Rights Agreement is not within the Board's jurisdiction (*see* Section I of this Reply). Accordingly, denial of a stay will not call into question TP&W's ability to terminate contracts under Indiana law Consequently, irreparable injury cannot be established on the alleged basis that such ability would be jeopardized by the trackage rights under consideration (Petition at 8)

III. WSRV WOULD BE HARMED BY A STAY

A stay would delay an orderly transition from CERA to US Rail as the operator of WSRV's rail lines That delay would be harmful to WSRV

IV. A STAY WOULD BE CONTRARY TO THE PUBLIC INTEREST

As is apparent from the foregoing, TP&W's opposition to the trackage rights under consideration is contractual, not regulatory. TP&W contends that its contract with WSRV is terminated. WSRV contends that it is not. An Indiana Court is the tribunal to resolve that dispute, not this Board. That being the case, a stay based on TP&W's contractual opposition would be contrary to the public interest.

Moreover, as shown earlier, TP&W's opposition is retaliatory, not based on any injury to itself. A reward of TP&W's retaliation by means of a grant of a stay would also be contrary to the public interest.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, it having been established that the Petitions fail to satisfy any of the legal prerequisites for a stay, let alone all of such prerequisites, the Petitions should be denied.

Respectfully submitted,

WINAMAC SOUTHERN RAILWAY COMPANY
P O Box 745
Kokomo, IN 46903

Applicant

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Attorney for Applicant

DATE FILED January 7, 2009

REPLY VERIFIED STATEMENT OF BRAD ORTMAN

My name is Brad Ortmann. I am Vice President of Winamac Southern Railway Company (WSRY). I am familiar with the Verified Notice of Exemption of trackage rights that WSRY filed with the Surface Transportation Board on December 11, 2008. I am also familiar with the rail operations of Central Railroad Company of Indianapolis (CBRA), as agent of WSRY.

My verified statement is in reply to allegations in the verified statement of Sandy Franger (VS Franger), Vice-President Contracts of Rail America, Inc. (RAI) that was filed by RAI subsidiary, Toledo, Peoria and Western Railway Corporation (TP&W), as part of its Petition for Stay on January 2, 2009.

Based on my knowledge of CBRA operations as agent of WSRY, I dispute Ms. Franger's statement that CBRA never operated over the trackage rights line in Logansport, IN as agent of WSRY under the Trackage Rights Agreement. The interchange point between TP&W and WSRY in Logansport is located at the eastern end of that City. In order for CBRA to transport traffic between that interchange point and shipper facilities located on WSRY's Logansport-Bringinghurst rail line, CBRA would necessarily have to operate over the trackage rights line in order to access and operate over WSRY's Logansport-Bringinghurst rail line. There has been substantial traffic that has been interchanged between TP&W and CBRA at Logansport that has been transported by CBRA to or from points on WSRY's Logansport-Bringinghurst rail line.

Without question, therefore, CBRA has operated over the trackage rights line in Logansport as agent of WSRY. The intent of Ms. Franger's statement may be that such operations were not treated by TP&W and CBRA as operations under the Trackage Rights

Agreement. TP&W and CERA are sister corporations commonly controlled by RAI. It may be that TP&W did not impose the terms of the Trackage Rights Agreement on its affiliated carrier, CERA. However, it is misleading for Ms. Franger to state that CERA never operated over the trackage rights line as agent of WSRV. As I have explained, CERA clearly did so.

 VP
BRAD ORTMAN

STATE OF INDIANA
COUNTY OF Hamilton

SUBSCRIBED and SWORN
to before me this 6 day
of January, 2009.


Notary Public

Before me, the undersigned, a
Notary Public for Hamilton County,
State of Indiana, personally
appeared J. Brady Ortman and
acknowledged the execution of this
instrument this 6th day of
January, 2009.

My Commission Expires January 25, 2016

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2009, I served the foregoing document, Reply in Opposition to Petitions for Stay, on Louis E Gitomer, Esq , Law Office of Louis E Gitomer, 600 Baltimore Avenue, Suite 301, Towson, MD 21204, *Lou_Gitomer@verizon net*, by e-mail and UPS overnight mail, and on Scott G Williams, Esq , Senior Vice President & General Counsel, Rail America, Inc , 7411 Fullerton Street, Suite 300, Jacksonville, FL 32256, by UPS overnight mail

Thomas F McFarland

Thomas F McFarland